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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91221325
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Consolidated Proceeding No.: 92/061,202
Red Bull GMBH v. Jordi Nogues, S.L.

Exhibits filed under
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>RED BULL GMBH,</p> <p>Petitioner/Opposer,</p> <p>v.</p> <p>JORDI NOGUES, S.L.</p> <p>Registrant/Applicant.</p>	<p>Consolidated Proceeding No.: 92/061,202¹</p> <p>Cancellation No: 92/061,202 Registration No.: 4,471,520 Trademark: BADTORO (and Design)</p> <p>Opposition No.: 91/221,325 Serial No.: 86/324,277 Trademark: Bull Design</p>
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REGISTRANT / APPLICANT JORDI NOGUES, S.L.’S MOTION TO COMPEL

Pursuant to Federal Rules of Civil Procedure 7 and 37 and Trademark Rule 2.120, Registrant/Applicant Jordi Nogues, S.L. (collectively, “Registrant”), by and through undersigned counsel, hereby respectfully moves the Trademark Trial and Appeal Board (“Board”) for an order compelling the Petitioner/Opposer Red Bull GmbH (collectively, “Petitioner”) to provide (1) written responses to (a) Registrant’s First Set of Requests for the Production of Documents and Things (“RFPs”) and (b) First Set of Interrogatories (“Interrogatories”) and (2) documents responsive to Registrant’s RFPs (hereinafter the “Motion to Compel”).

¹ (*See* Cancellation No. 92/061,202, at Docket Entry (“D.E.”) Nos. 8 & 9; Opposition No. 91/221,325 at D.E. Nos. 8 & 9.)

PRECISE RELIEF REQUESTED AND GROUNDS THEREFORE

By the instant Motion to Compel, Registrant respectfully requests the following: that the Board enter an order compelling Petitioner to (1) make a full production of all documents responsive to Registrant's RFPs; (2) answer fully Registrant's Interrogatories; and (3) as the Motion to Compel was necessitated by Petitioner's failure to comply with its discovery obligations, an order requiring Petitioner to pay Registrant's reasonable fees and expenses incurred in bringing the instant Motion to Compel, including Registrant's attorneys' fees. The foregoing relief is authorized under, *inter alia*, Federal Rule of Civil Procedure 37.

TRADEMARK RULE 2.120(e)(1) STATEMENT OF GOOD FAITH CORRESPONDENCE

Pursuant to Trademark Rule 2.120, counsel for Registrant hereby states that Registrant has made a good faith effort, by conference or correspondence, to resolve with Petitioner the issues presented in this Motion to Compel but the parties have been unable to resolve their differences. Specifically, counsel for Registrant sent counsel for Petitioner an email requesting a conference on November 16, 2015. (*See* email correspondence between J. Rupp and A. Riordan, dated November 16-19, 2015, attached hereto as **Exhibit "A"**.) In Registrant's original conference request, Registrant sought a meet and confer at a mutually agreeable time on either the 16th, 17th, or 18th of November. (*See id.*) Petitioner ignored this first email entirely. (*See id.*) Receiving no response, counsel for Registrant again sent counsel for Petitioner a more detailed follow up email requesting a conference for a second time on November 18, 2015. (*See id.*) Counsel for Petitioner finally responded by email on November 19, 2015, but provided a largely non-sequitur response without addressing Registrant's conference request. (*See id.*) Specifically, in addition to ignoring Registrant's request for a meet and confer, Petitioner's response fails to address the substantive issues in Registrant's November 18, 2015 email. (*See id.*) Nevertheless, Counsel for Registrant responded requesting clarification and a conference for a third time. (*See id.*) Thereafter, while Petitioner's counsel has feigned an alleged willingness to meet and confer at some unidentified point in the future, Petitioner's counsel refuses to commit to a timely meet

and confer, instead ostensibly seeking to delay the Motion to Compel indefinitely through ongoing delay of a meaningful conference. (*See id.*) To this end, Registrant submits that it has made multiple good faith attempts to resolve the issues presented herein via correspondence and/or a conference but to no avail; Registrant now seeks the Board's assistance.

STATEMENT OF RELEVANT FACTS

1. The Cancellation proceeding was inaugurated by Petitioner on April 1, 2015. (*See* Cancellation No. 92/061,202, at D.E. No. 1.)

2. Shortly thereafter, Registrant answered, discovery commenced on June 11, 2015, and discovery is currently set to close on January 7, 2016. (*See id.* at D.E. Nos. 2 & 5; *see also id.* at D.E. Nos. 6-7 (extending time at Petitioner's request).)

3. The Opposition proceeding was also inaugurated by Petitioner on April 1, 2015. (*See* Opposition No. 91/221,325, at D.E. No. 1.)

4. Shortly thereafter, Registrant answered, discovery commenced on June 10, 2015, and discovery is currently set to close on January 6, 2016. (*See id.* at D.E. Nos. 2 & 5; *see also id.* at D.E. Nos. 6-7 (extending time at Petitioner's request).)

5. Since that time, the parties have agreed to consolidate the Cancellation and Opposition proceedings for efficiency and economy of administration on the understanding (and binding legal maxim) that each proceeding retains its distinct identity and is governed by separate and distinct legal standards. (*See* Cancellation No. 92/061,202, at D.E. Nos. 8 & 9; Opposition No. 91/221,325 at D.E. Nos. 8 & 9.)

6. Prior to consolidation, Registrant served its "First Set of Written Discovery" on Petitioner, including Registrant's RFPs and Interrogatories, on September 17, 2015 in both the Cancellation and Opposition proceedings, respectively. (*See* Respondent Jordi Nogues, S.L.'s First Set of Written Discovery to Petitioner Red Bull GmbH, attached hereto as **Exhibit "B"**; Applicant Jordi Nogues, S.L.'s First Set of Written Discovery to Opposer Red Bull GmbH, attached hereto as **Exhibit "C"**.)

7. While not at issue in the instant Motion to Compel, Registrant's First Set of Written Discovery to Petitioner also includes various requests for admission. (*See id.*) Such requests have now been admitted *in toto* by operation of law. *See* FED. R. CIV. P. 36(a)(3); *see also* TBMP §§ 411.03, 523.01, and 524.01.

8. Having been served with Registrant's First Set of Written Discovery on September 17, 2015, Petitioner's responses and documents were due on or before October 22, 2015. *See* FED. RS. CIV. P. 33-36; 37 CFR § 2.120(a)(3).

9. On October 14, 2015, Petitioner requested and was granted a two-week extension of time to respond to Registrant's First Set of Written Discovery. (*See* email correspondence between J. Rupp and A. Riordan, dated October 13-14, 2015, attached hereto as **Exhibit "D"**.)

10. On October 29, 2015, Petitioner requested and was granted an additional one-week extension of time to respond to Registrant's First Set of Written Discovery. (*See* email correspondence between J. Rupp and A. Riordan, dated October 29, 2015, attached hereto as **Exhibit "E"**.)

11. Accounting for the extensions referenced above, Petitioner's responses and documents were due on or before November 12, 2015. *See* FED. RS. CIV. P. 33-36; 37 CFR § 2.120(a)(3). (*See also* Exs. D and E.)

12. Petitioner's November 12, 2015 deadline has come and gone yet Petitioner has failed to provide any written responses or documents as requested in Registrant's First Set of Written Discovery.

13. In view of Petitioner's failure to participate in discovery, and pursuant to Trademark Rule 2.120 as discussed above, counsel for Registrant made a good faith effort, by conference or correspondence, to resolve with Petitioner the issues presented in this Motion to Compel but the parties have been unable to resolve their differences. (*See* Ex. A.) Petitioner has refused to provide any of the responses or documents requested in Registrant's First Set of Written Discovery. (*See* Exs. B & C.)

14. On November 12, 2015, Petitioner filed a Motion for Judgment on the Pleadings and Request for Board-Issued Suspension Order (the “Pleadings Motion”). (*See* Cancellation No. 92/061,202, at D.E. No. 10; Opposition No. 91/221,325 at D.E. No. 10.) The Pleadings Motion is limited to substantive relief allegedly available solely in the Opposition proceeding. (*See, e.g., id.* at 1 (moving for “judgment on the pleadings ... based on a detrimental non-correctable error on the initial application *for Application No. 86/324,277*” (emphasis added)).) As such, the Pleadings Motion, even if meritorious and granted, will not substantively impact the Cancellation proceeding. (*See id.*) Buried in a footnote, and without any showing of good cause or other legally cognizable explanation, Petitioner’s Pleadings Motion requests a blanket “60-day” extension of “any and all deadlines relating to discovery” in the Cancellation proceeding solely in the contingent event that consolidation of the Cancellation and Opposition proceedings is denied. (*See id.* at n.10.) Registrant’s response to the Pleadings Motion is not yet due.

ARGUMENT

I. LEGAL STANDARDS GOVERNING THE MOTION TO COMPEL

As a general matter, it is well-understood that the Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1; *see also* 37 CFR § 2.116(a) (“[e]xcept as otherwise provided, and wherever applicable and appropriate, procedure and practice in inter partes proceedings shall be governed by the Federal Rules of Civil Procedure.”). It is equally axiomatic that, pursuant to Federal Rules of Civil Procedure 26 and 33, 34 and 36, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things.” FED. R. CIV. P. 26(b)(1). Moreover, “[f]or good cause, the [Board] may order discovery of any matter relevant to the subject matter involved in the action.” *Id.* And “[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Indeed, reciprocal and

full discovery is “essential to proper litigation” so that both parties have “[m]utual knowledge of all the relevant facts.” *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *see also Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) (“The law’s basic presumption is that the public is entitled to every person’s evidence” and “[t]he Federal Rules of Civil Procedure strongly favor full discovery whenever possible.”). “To that end, either party may compel the other to disgorge whatever facts he has in his possession.” *Hickman*, 329 U.S. at 507.

In order to further these general discovery considerations, Federal Rule of Civil Procedure 37 explicitly provides that “[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery.” FED. R. CIV. P. 37(a)(1); 37 CFR § 2.120(e)(1) (“If a party fails to ... answer any question propounded in ... any interrogatory, or fails to produce and permit the inspection and copying of any document or thing, the party entitled to ... or seeking discovery may file a motion to compel ... an answer, or production and an opportunity to inspect and copy....”); *see also* TBMP § 523 *et seq.* In particular, “[a] party seeking discovery may move for an order compelling an answer, designation, production or inspection.” FED. R. CIV. P. 37(a)(3)(B); 37 CFR § 2.120(e)(1); TBMP § 523 *et seq.* In determining the necessity of compelling discovery, Federal Rule of Civil Procedure 37 clarifies that “an evasive or incomplete disclosure, answer or response *must* be treated as a failure to disclose, answer or respond.” FED. R. CIV. P. 37(a)(4) (emphasis added). In addition, “[i]f the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the [Board] *must*, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” FED. R. CIV. P. 37(a)(5) (emphasis added); *see also* TBMP § 411.02. Motions to compel are routinely granted by the Board under the foregoing standards. *See, e.g., Johnson & Johnson & Roc Int’l S.A.R.L. v. Obschestvo s Oranitchennoy*, 95 USPQ 2d 1567, 1570 (TTAB 2010); *Jain v. Ramparts Inc.*, 49 USPQ 2d 1429, 1436 (TTAB 1998).

A. Despite a Three-Week Extension of Time, Petitioner Has Categorically Failed to Provide Any Written Responses or Documents as Requested in Registrant's First Set of Written Discovery; Petitioner's Responses and Documents Must be Compelled

Petitioner's conduct presents an exceptionally straightforward and simple violation of the Federal Rules of Civil Procedure and Petitioner's discovery obligations. Specifically, following *Petitioner's* inauguration of these proceedings, Registrant unequivocally served its First Set of Written Discovery on Petitioner, including Registrant's RFPs and Interrogatories, on September 17, 2015. (*See* Statement of Relevant Facts ("SRF"), *supra*, at ¶¶ 1-6; *see also* Exs. B & C.) Having been served with Registrant's First Set of Written Discovery on September 17, 2015, Petitioner's responses and documents were due on or before October 22, 2015. *See* FED. RS. CIV. P. 33-36; 37 CFR § 2.120(a)(3). Nevertheless, on October 14, 2015, Petitioner requested and was granted a two-week extension of time to respond to Registrant's First Set of Written Discovery. (*See* SRF, *supra*, ¶ 9; *see also* Ex. D.) Moreover, on October 29, 2015, Petitioner requested and was granted an additional one-week extension of time to respond to Registrant's First Set of Written Discovery. (*See* SRF, *supra*, ¶ 10; *see also* Ex. E.) Accounting for these two extensions, Petitioner's responses and documents were due on or before November 12, 2015. *See* FED. RS. CIV. P. 33-36; 37 CFR § 2.120(a)(3). Nevertheless, to date, the November 12, 2015 deadline having long-since passed, Petitioner still has yet to provide *any* written responses or documents as requested in Registrant's First Set of Written Discovery. (*See* SRF, *supra*, ¶ 12.) Indeed, Registrant has thrice requested Petitioner to confirm whether any discovery responses or documents will be forthcoming. (*See* Ex. A.) Petitioner has flatly ignored theses repeated requests and Registrant still has yet to receive any responses or documents. (*See id.*)

Under such circumstances, while not at issue in the instant Motion to Compel, Registrant's several requests for admission have been deemed admitted *in toto* by operation of law. *See* FED. R. CIV. P. 36(a)(3); *see also* TBMP §§ 411.03, 523.01, and 524.01. Incidentally, Petitioner has thus admitted, *inter alia*, that the RED BULL marks, in their various forms, are generic inasmuch as they are used by the general consuming public to refer to energy drinks.

(See Exs. B & C at Registrant's First Set of Requests for Admission.) Such an admission eviscerates Petitioner's standing in these matters.

For purposes of the instant Motion to Compel, however, Petitioner's willful and total failure to provide even a single response to Registrant's First Set of Written Discovery comprises a violation of Petitioner's discovery obligations. Petitioner should not be allowed to bring these proceedings and then fail to participate in their meaningful prosecution. Registrant is entitled to discovery. *See* FED. RS. CIV. P. 26, 33, and 34; *Hickman*, 329 U.S. at 507. Registrant is also entitled to the just, speedy, and inexpensive determination of these proceedings. FED. R. CIV. P. 1. To this end, and in view of Petitioner's failure to comply with its discovery obligations or otherwise meaningfully engage in the discovery process, Registrant brings the instant Motion to Compel pursuant to Federal Rule of Civil Procedure 37. *See* FED. R. CIV. P. 37(a)(1), (a)(3)(B), (a)(4); 37 CFR § 2.120(e)(1); TBMP § 523 *et seq.* More specifically, Registrant respectfully requests that the Board enter an order compelling Petitioner to make a full production of all documents responsive to Registrant's RFPs and to fully answer Registrant's Interrogatories.

B. Petitioner Should Pay Registrant's Reasonable Expenses Incurred in Bringing the Instant Motion to Compel as the Same Has Been Necessitated by Petitioner's Conduct

In addition, as Petitioner's failure to provide documents or discovery responses has necessitated the instant Motion to Compel, Petitioner must be ordered to "pay [Registrant's] reasonable expenses incurred in making the motion, including attorney's fees." FED. R. CIV. P. 37(a)(5); *see also* TBMP § 411.02. This is particularly true where Petitioner's refusal to provide documents or discovery responses has been further aggravated by Petitioner's failure to meaningfully meet and confer regarding the forgoing issues. (*See* Ex. A.) At bottom, as Petitioner has refused to make any discovery responses, sanctions at this juncture are appropriate. *See* FED. R. CIV. P. 37(a)(5); TBMP § 411.02.

II. PETITIONER'S PLEADINGS MOTION DOES NOT EXCUSE PETITIONER'S FAILURE TO PARTICIPATE IN DISCOVERY

Petitioner has suggested that its Pleadings Motion somehow excuses Petitioner's failure to participate in discovery. (*See* Ex. A.) It does not. To begin with, pursuant to Section 504 of the Trademark Trial and Appeal Board Manual of Procedure, a motion for judgment on the pleadings does not automatically result in a suspension of proceedings and, even if it did, this does not equate to a blanket extension or suspension of existing formal discovery obligations. *See* TBMP § 504. And, inasmuch as the Pleadings Motion seeks a suspension pursuant to Section 510 of the Trademark Trial and Appeal Board Manual of Procedure, this is also unavailing. *See* TBMP § 510. Specifically, Section 510 explicitly states that "[t]he filing of ... a potentially dispositive motion does not, in and of itself, operate to suspend a case; until the Board issues its suspension order, *all times continue to run.*" *See* TBMP § 510.03(a) (emphasis added). Moreover, even if the case is suspended, Section 510 merely states that such a suspension prohibits the "fil[ing] ... of any paper which is not germane to the motion," it does not automatically curtail existing discovery obligations. *See* TBMP § 510; 37 CFR § 2.127(d). Indeed, Section 510 continues: while a party may not serve additional discovery during a suspension, "[t]he filing of a motion ... shall not toll the time for a party to comply with any disclosure requirement or to respond to any outstanding discovery requests...." *See* TBMP § 510; 37 CFR § 2.120(e)(2). In short, there is no authority for Petitioner's unilateral refusal to provide discovery responses and documents merely because the Pleadings Motion has been filed. To the contrary, Petitioner is in blatant violation of its discovery obligations which were pending at the time the Pleadings Motion was filed.

It is also notable that Petitioner waited until the evening of its discovery deadline to file the Pleadings Motion. (*See* Cancellation No. 92/061,202, at D.E. No. 10; Opposition No. 91/221,325 at D.E. No. 10.) Specifically, the Pleadings Motion should, of necessity, be premised solely on the *pleadings*. *See* TBMP § 504. Petitioner's operative complaints were filed on April 1, 2015 and Registrant's answers were filed on April 22, 2015. (*See* Cancellation No. 92/061,202,

at D.E. Nos. 1 & 5; Opposition No. 91/221,325 at D.E. Nos. 1 & 5.) Accordingly, Petitioner's Pleadings Motion could have been filed shortly after Registrant's answers were on file. Nearly seven (7) months have elapsed since that time without any motion from Petitioner. Instead, Petitioner feigned participation in the discovery process long enough to receive Registrant's discovery responses and then, on the eve of Petitioner's discovery deadline, Petitioner finally brought the Pleadings Motion at the eleventh hour. Such gamesmanship should not be countenanced.

In addition, there can be no dispute that the Pleadings Motion is limited to substantive relief allegedly available solely in the Opposition proceeding. (*See, e.g.*, Cancellation No. 92/061,202, at D.E. No. 10 at 1 (moving for "judgment on the pleadings ... based on a detrimental non-correctable error on the initial application *for Application No. 86/324,277*" (emphasis added)).) Importantly, "[c]onsolidated cases do not lose their separate identity because of consolidation." TBMP § 511. Indeed, when the parties agreed to consolidate these matters, it was on the express understanding that each proceeding would retain its distinct identity and be governed by separate and distinct legal standards. (*See SRF, supra*, ¶ 5.) Nevertheless, without any basis for delaying or suspending the Cancellation proceeding, and without any substantive motion on file impacting the Cancellation proceeding, Petitioner now seeks to entirely avoid its discovery obligations in both the Opposition *and Cancellation* proceedings. At a minimum, Petitioner is obligated to provide discovery responses in the Cancellation proceeding. Again, Petitioner's eleventh-hour gamesmanship should not be countenanced by this Board or condoned by relieving Petitioner of its discovery obligations after-the-fact.

Along these same lines, Petitioner has now suggested that the Pleadings Motion is somehow also a motion for an extension of time. (*See Ex. A.*) It is nothing of the sort. First, "all motions should be filed separately, or at least be captioned separately, to ensure they receive attention." TBMP § 502.02(b). Indeed, "[a] party should not embed a motion in another filing that is not routinely reviewed by the Board upon submission." *Id.* In violation of these maxims,

Petitioner's Pleadings Motion is facially a motion for judgment on the pleadings, not a motion for an extension of time, which should have been filed separately. (*See, e.g.*, Cancellation No. 92/061,202, at D.E. No. 10 at 1.) Indeed, Petitioner's Pleadings Motion is not even captioned as a motion for an extension of time. (*See, e.g., id.*) Instead, buried in a footnote, and without any showing of good cause or other legally cognizable explanation, Petitioner's Pleadings Motion requests a blanket "60-day" extension of "any and all deadlines relating to discovery" in the Cancellation proceeding solely in the contingent event that consolidation of the Cancellation and Opposition proceedings is denied. (*See, e.g., id.* at n.10.) Embedding an extension request clandestinely in a footnote, premised solely on an unlikely contingency, is untoward, ineffectual, and in violation of Board procedure. TBMP § 502.02(b). Moreover, the Pleadings Motion never invokes Federal Rule of Civil Procedure 6 or Section 509 of the Trademark Trial and Appeal Board Manual of Procedure. Worse, Petitioner's Pleadings Motion makes no effort whatsoever to support the "good cause" showing required under Rule 6 and Section 509. *See* FED. R. CIV. P. 6; TBMP § 509. Instead, Petitioner baldly requests a "60-day" extension of time (apparently starting from some ambiguous and unidentified future point), more than doubling or even possibly tripling Petitioner's original allotment of time in view of the extensions already granted. Even if Petitioner had attempted to show good cause for an extension, which it has not, a 60-day extension of time from an unidentified future point cannot possibly be supported by good cause.

In sum, Petitioner's Pleadings Motion has nothing to do with Petitioner's discovery obligations and is no obstacle to granting the instant Motion to Compel.

CONCLUSION

For all of the foregoing reasons, Registrant respectfully requests that the Board enter an order compelling Petitioner to (1) make a full production of all documents responsive to Registrant's RFPs, (2) answer fully Registrant's Interrogatories, and (3) as the Motion to Compel was necessitated by Petitioner's failure to comply with its discovery obligations, an order

requiring Petitioner to pay Registrant's reasonable fees and expenses incurred in bringing the instant Motion to Compel, including Registrant's attorneys' fees.

Respectfully submitted on November 20, 2015.

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JORDI NOGUES, S.L.

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of November, 2015, I served a copy of the foregoing **REGISTRANT / APPLICANT JORDI NOGUES, S.L.'S MOTION TO COMPEL** on the attorney for Opposer, as designated below, by placing said copy in the United States Mail, first class, postage prepaid, with an advance copy via email, addressed as follows:

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